

This Opinion is Not a
Precedent of the TTAB

Mailed: May 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Sferra Fine Linens, LLC

v.

Sfera Joven S.A.
—

Opposition No. 91226943

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Elizabeth Z. Baumhart and Amanda H. Wilcox of Taft, Stettinius & Hollister LLP
for Sferra Fine Linens, LLC.

Samuel F. Pamas Portalatin of Hogle & Pamas, P.S.C.
for Sfera Joven S.A.

—
Before Adlin, Coggins and Allard, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Sfera Joven S.A. seeks registration of the mark shown below for: “perfumery, namely, perfume, toilet water, scented water, cologne, essential oils for personal use, cosmetics, namely, body, face and skin moisturizing creams, lotions and tonics,” in International Class 3; “leather handbags, imitation leather sold in bulk; umbrellas, parasols, walking sticks, whips and harness; billfolds and wallets made of leather,” in International Class 18; and “clothing, namely, suits, coats, raincoats, pants, dresses, shirts, sweaters, stockings, scarves, shoes, slippers, boots; gloves and hats,” in International Class 25:

(Sfera)¹

In its notice of opposition, Opposer Sferra Fine Linens, LLC alleges prior use and registration of the allegedly “famous” marks SFERRA² and SFERRA BROS.³, in standard characters and typed form, respectively,⁴ both for “table linen; table linen, namely, tablecloths not of paper, coasters, table mats not of paper, napkins, placemats, table runners; bed linen, bed sheets, bedspreads, pillow cases, pillow covers, pillow shams, duvet covers, blankets, throws, lap robes; baby blankets, baby bed linens, baby quilts, shams; guest towels, bath towels, hand towels, washcloths and bath sheets,” in International Class 24. As grounds for opposition, Opposer alleges, under Trademark Act Sections 2(d) and 43(c), 15 U.S.C. §§ 1052(d) and

¹ Application Serial No. 86478809, filed December 12, 2014, under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based on European Union Registration No. 4563541. The application includes this translation statement: “The English translation of ‘SFERA’ in the mark is ‘SPHERE’.” It also includes this description of the mark: “The mark consists of the word ‘SFERA’ written between parentheses, the left parenthesis appearing slightly above and the right parenthesis slightly below the word.”

² Registration No. 3205168, issued February 6, 2007 (the “168 Registration”); renewed.

³ Registration No. 3012913, issued November 8, 2005 with a Section 2(f) claim of acquired distinctiveness as to the entire mark (the “913 Registration”); renewed.

⁴ There is no substantive difference between “standard character” marks and marks in “typed” form. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks, but the preferred nomenclature was changed in 2003 to conform to the Madrid Protocol ... we do not see anything in the 2003 amendments that substantively alters our interpretation of the scope of such marks”).

1125(c), that use of Applicant's mark would be likely to cause confusion with, and dilute, Opposer's marks, but because Opposer did not pursue its dilution claim, it is waived. *Alcatraz Media, Inc. v. Chesapeake Marine Tour Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014). In its answer, Applicant denies the salient allegations in the notice of opposition and asserts a number of "Affirmative Defenses," most of which merely amplify its denials. And, because Applicant did not pursue its true affirmative defenses, they are waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

I. The Record and Evidentiary Objection

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced:

Testimony Declaration of Michelle Klein, its President and Chief Executive Officer, and the exhibits thereto ("Klein Dec."). 55 TTABVUE 2-11, 25-952.⁵

Testimony Declaration of Christopher McRorie, its Vice President, Secretary and General Counsel, and the exhibits thereto ("McRorie Dec."). 55 TTABVUE 13-952.⁶

⁵ Citations to the record are to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

⁶ Opposer's testimony declarations are essentially identical. In fact, the witnesses give essentially identical testimony using the same wording/language, and their declarations cite to identical exhibits.

Notice of Reliance (“NOR”) on official records, Applicant’s responses to Opposer’s discovery requests, printed publications and Internet printouts.⁷ 57 TTABVUE.

Applicant did not take any testimony or introduce any other evidence.

In its Trial Brief, Applicant objects, for the first time, to unspecified “information and evidence that was requested in Applicant’s Set of Interrogatories and Request for Documents and Things, that was untimely produced by Opposer.” 68 TTABVUE 7-8. *See* TRADEMARK BOARD MANUAL OF PROCEDURE (“TBMP”) § 527.01(e) (discussing the estoppel sanction). The objection is overruled. Applicant concedes that Opposer timely served its written discovery responses on the January 18, 2022 deadline, and its complaint is merely that Opposer did not serve the responsive documents themselves until one day later. 68 TTABVUE 10-11, 30-31. As Opposer points out, however, it is typical, and contemplated by the applicable Rules, that written responses are served prior to the applicable deadline, but responsive documents may be served thereafter, often following some negotiation regarding the time, place and manner of production. *See* Fed. R. Civ. P. 34(b)(2)(B). More importantly and substantively, Applicant admits that it received the discovery documents three months before Opposer filed its trial evidence, so has suffered no prejudice.

⁷ Neither “product packaging” nor financial records are admissible via notice of reliance, Trademark Rule 2.122(e)(1) (printed publications and official records), except to the extent they may fall within Trademark Rule 2.122(e)(2) (Internet materials). Because Opposer’s product packaging and financial records submitted with its NOR (the financial records submitted confidentially in 58 TTABVUE) do not fall within Trademark Rule 2.122(e)(2), they have not been considered. In any event, Opposer introduced the same financial records via witness testimony, and those have been considered. Opposer’s discovery responses submitted with its own NOR “may be submitted and made part of the record only by the receiving or inquiring party ...,” Trademark Rule 2.120(k)(5), and have therefore not been considered.

II. Relevant Facts

Opposer supplies “a wide range of luxury linen related goods, including, but not limited to, sheets, bedding, towels, napkins, décor, and more, to customers globally, including in the United States.” 55 TTABVUE 3 (Klein Dec. ¶ 6). It began using its SFERRA BROS. mark in 1891, and “shortened” the mark to SFERRA in 2004. *Id.* (Klein Dec. ¶ 7). Since Opposer’s founding, “ownership of the company and the SFERRA BROS. and SFERRA trademarks have changed hands several times.” *Id.* (Klein Dec. ¶ 8).

Opposer “markets its SFERRA Goods to consumers of all types in the market for luxury linen goods, and sells through ordinary trade channels employed by companies in the linen industry, including online trade channels, major department stores and retailers, and directly to the hospitality industry.” *Id.* at 6 (Klein Dec. ¶ 15). Opposer’s “luxury” linens and linen-related products are, not surprisingly, expensive. For example: table runners are priced from \$44-\$144; bedding collections from \$95-\$4298; mattresses from \$3,725-\$6,995; bed pillows from \$87-\$7,331; and dog beds at \$245. *Id.* at 8-9 (Klein Dec. ¶ 23).

Applicant did not introduce any evidence, but according to Opposer “Applicant is an apparel and fashion company based in Madrid, Spain Its parent company, El Corte Ingles S.A. also based in Madrid, Spain, sells SFERRA branded apparel goods in its department store locations in Spain and Portugal and online.” *Id.* at 10 (Klein Dec. ¶ 26).

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark). Here, Opposer's pleaded registrations establish that it is entitled to oppose registration of Applicant's mark on the ground of likelihood of confusion. 55 TTABVUE 4-5, 462-63 (Klein Dec. ¶ 11 and Ex. 7); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing").

IV. Priority

Because Opposer's pleaded registrations are of record, and Applicant has not counterclaimed to cancel either of them, priority is not at issue with respect to the marks and goods identified therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Opposer also introduced evidence that it offers bathrobes, scarves, diffusers and candles. 55 TTABVUE 21, 262, 311-12, 367-68 (Klein Dec. ¶ 28 and Ex. 5). However, there is no evidence concerning when Opposer started offering these goods, and therefore Opposer has not established common law use of either of its pleaded marks for these goods prior to Applicant's priority/filing date of December 12, 2014. *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1140 (TTAB 2013) ("for when an application or registration is of record, the party may rely on the filing date of the application for registration, *i.e.*, its constructive use date").

V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

We focus our analysis on the mark in Opposer's pleaded '168 Registration (SFERRA). If we find confusion likely between that pleaded mark and Applicant's involved mark, we need not consider the likelihood of confusion between Applicant's mark and Opposer's other pleaded mark. On the other hand, if we find no likelihood of confusion between the mark in the pleaded '168 Registration and Applicant's mark, we would not find confusion likely between Applicant's mark and Opposer's other pleaded mark. *In re Max Cap. Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Strength of Opposer's Mark

We first consider the strength of Opposer's mark, to determine the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength").

Turning first to conceptual strength, "[t]he SFERRA trademark originates from the brand's founder, Genaro Sferra, who immigrated into the United States in 1891 and began selling SFERRA BROS. branded linen goods up and down the East Coast." 55 TTABVUE 3 (Klein Dec. ¶ 8). While surnames such as SFERRA may be considered conceptually weak, this is not always the case. *Wet Seal Inc. v. FD Mgt. Inc.*, 82 USPQ2d 1629, 1639 n.20 (TTAB 2007) ("The fact that ARDEN is a surname does not automatically render the mark weak or entitled to only a narrow scope of protection."). Here, Opposer's SFERRA mark is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f), and entitled to the

presumptions of Section 7(b) of the Act, including that it is valid/distinctive. Moreover, Applicant has not introduced any evidence showing that Opposer's SFERRA mark is anything other than inherently distinctive. We therefore find that Opposer's mark is not conceptually weak, and that it is entitled to the normal scope of protection accorded to inherently distinctive marks.

Turning to commercial strength, Opposer argues that its pleaded SFERRA mark is "famous." 67 TTABVUE 26-28. Fame is not "an all-or-nothing" proposition, however. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017). We must determine where to place SFERRA on the "spectrum" of marks, which ranges from "very strong to very weak." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)). The stronger the mark, the greater the scope of protection to which it is entitled. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017) ("A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis."); *Nike, Inc. v. WNBA Enters., LLC*, 85 USPQ2d 1187, 1198 (TTAB 2007). When a mark is famous or very strong, that plays a dominant role in the likelihood of confusion analysis. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting *Recot*, 54 USPQ2d at 1897; *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992)).

Fame or commercial strength “of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Bose*, 63 USPQ2d at 1305. Other relevant factors include “length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

Here, Opposer’s evidence falls short of establishing that its pleaded SFERRA mark is famous or very strong. The mark’s longstanding use is certainly impressive, and Opposer’s confidential sales figures are significant. 55 TTABVUE 3 and 56 TTABVUE 7, 9, 26-95 (Klein Dec. ¶¶ 8, 17-19, 24 and Ex. 12). Opposer’s advertising expenses are also high enough that we would expect Opposer’s promotional efforts to have reached an appreciable number of relevant consumers. 56 TTABVUE 7, 26 (Klein Dec. ¶ 20 and Ex. 12). Nonetheless, “[w]e have no context for opposer’s advertising and sales figures,” or its other evidence of strength, “such as how the figures for [products bearing Opposer’s pleaded marks] compare with that for other brands of’ linens and related products. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1831 (TTAB 2012); *see also Bose*, 63 USPQ2d at 1309 (“some context in which to place raw statistics is reasonable”); *Fossil Inc. v. Fossil Grp.*, 49 USPQ2d 1451, 1457 (TTAB 1998) (“Raw sales and advertising figures unless they are extraordinarily large, which is not the case with opposer’s FOSSIL products are simply not sufficient by themselves to establish that the mark is famous.”).

Furthermore, public exposure to Opposer and its mark via social and traditional media is underwhelming, and suggestive of the SFERRA mark enjoying a moderate rather than high level of commercial strength. For example, while the record does not reveal how many people have “followed” or “liked” Opposer on Facebook, Opposer’s individual Facebook posts generally receive relatively few, if any, “likes,” “shares” or comments. 55 TTABVUE 5, 465-549 (Klein Dec. ¶ 13 and Ex. 8). Similarly, Opposer has only a few thousand followers on Twitter and its individual “tweets” have received few if any comments, “likes” or “retweets.” *Id.* at 5, 552-680 (Klein Dec. ¶ 13 and Ex. 9). While Opposer has almost 13,000 Instagram followers, even this higher number falls well short of what would be expected for “famous” or very strong marks. *Id.* at 5, 682-810 (Klein Dec. ¶ 13 and Ex. 9). While Opposer’s advertisements have appeared in FORBES LIFE, TOWN & COUNTRY, ARCHITECTURAL DIGEST and other publications, Opposer failed to introduce circulation figures for these publications, and the record reveals scant unsolicited media attention. *Id.* at 7-8, 68-87, 816-22, 905-11, 918-20 (Klein Dec. ¶ 21 and Exs. 2, 11).⁸

Nonetheless, Opposer appears to be a successful business and the record reveals that many consumers of what Ms. Klein refers to as “luxury linen related goods” have

⁸ Opposer’s website and Trial Brief tout Opposer’s “luxurious advancements” in the linen field, which according to Opposer make its identified goods “prized enough to become the in-flight bedding for Pope John Paul II, the elegant table linens of Reagan-era state dinners, and the de rigeur bedding found in celebrity linen closets.” 55 TTABVUE 380 (Klein Dec. Ex. 5); 67 TTABVUE 11, 27. However, the website evidence that Opposer’s goods are “prized” by famous people is not supported by witness testimony. We have not considered Opposer’s website evidence for the truth of the assertions therein, unless those assertions are supported by witness testimony. *Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1037 n.14 and 1040 (TTAB 2010). In any event, even if we had considered this information, it would not change our finding regarding the SFERRA mark’s level of commercial strength.

been exposed to Opposer's SFERRA mark. We therefore find that Opposer's mark is commercially somewhat strong, and that this weighs in favor of finding a likelihood of confusion.

B. The Marks

The marks are more similar than dissimilar in "appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Indeed, the only difference between Opposer's mark and the literal element of Applicant's mark is that Applicant's mark is spelled with one "r" while Opposer's is spelled with two. Marks that differ by a single letter are often found confusingly similar. See e.g. *Apple Comput. v. TVNET.net, Inc.*, 90 USPQ2d 1393, 1396 (TTAB 2007) (VTUNES.NET vs. ITUNES); *Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (LEGO vs. MEGO); *In re Total Quality Grp. Inc.*, 51 USPQ 1474, 1476 (TTAB 1999) (STRATEGYN vs. STRATEGEN).

Because of their similarities, the marks look quite similar. We would also expect them to be pronounced similarly or identically, and Opposer has introduced evidence suggesting as much. 55 TTABVUE 10, 941-42 (Klein Dec. ¶ 27 and Ex. 13).

We have not ignored the "parentheses" design element of Applicant's mark, but the parentheses would likely have no impact on how Applicant's mark is pronounced, and the design's effect on the mark's appearance is merely to highlight the term "SFERRA," which differs from Opposer's mark by only one letter. In any event, the design element of Applicant's mark is less significant in our analysis because

consumers are likely to call for Applicant's goods by the term "SFERA," the mark's only literal element. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) ("the verbal portion of a word and design mark likely will be the dominant portion"); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that "if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services" and "because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar").

We recognize that the marks will convey different meanings, at least to some Spanish speaking United States consumers, because "sfera" is Spanish for "sphere," while SFERRA is Opposer's founder's surname. We find this difference outweighed, however, by the marks' similarities in appearance and sound. Moreover, Spanish speaking consumers who merely hear the marks (especially if they are not pronounced by Spanish speakers) rather than seeing them may not perceive any difference in meaning. Moreover, we must also be concerned with United States consumers who do not speak Spanish (as well as Spanish speakers who do not "stop and translate" Applicant's mark), and these relevant consumers may not perceive any difference between the marks in meaning or commercial impression.

In short, we find the marks' similarities more important than their dissimilarities. This factor also weighs in favor of finding a likelihood of confusion.

C. The Goods and Their Channels of Trade and Classes of Consumers

In considering the goods, we have kept in mind that they need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that “could give rise to the mistaken belief that [the] goods emanate from the same source.” *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot, Inc. v. Benton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, however, Opposer has failed to introduce any evidence that the goods are related, or that they are marketed in a manner that could give rise to the mistaken belief that they emanate from the same source. In fact, in the sections of its Trial Brief subtitled “Applicant’s Intended Goods are Highly Similar to Sferra’s Goods” and “Applicant’s Trade Channels Are Likely to Be the Same as Those Used By Sferra,” Opposer cites only: the involved application and pleaded registrations and their identifications of goods; Opposer’s common law use of its SFERRA mark for bathrobes, scarves, diffusers and candles, without including any evidence of use prior

to Applicant's priority (filing) date; materials from Opposer's NOR; Opposer's "belief" that Applicant has not yet used its involved mark in the United States; Applicant's foreign use of its involved mark; and Opposer's channels of trade and advertising practices. 67 TTABVUE 21-25 & fns. 25-34.

The cited evidence is of no help to Opposer. In fact, the goods for which Opposer has not established prior use are irrelevant to its likelihood of confusion claim. The materials in Opposer's NOR which are not supported by accompanying testimony are not admissible for the truth of the matters asserted therein, but instead are admissible only for what they show on their face. *Safer*, 94 USPQ2d at 1037 n.14 and 1040. Opposer's channels of trade and advertising practices are insufficient to establish that the parties' channels of trade and classes of consumers overlap, when Opposer provides evidence of only Applicant's foreign use the involved mark, because Applicant's foreign use is irrelevant in this United States opposition proceeding. *See Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612-13 (TTAB 1991) ("Information concerning applicant's foreign activities, including foreign trademark applications and/or registrations, is not relevant to the issues in an opposition proceeding.").

That leaves Opposer with nothing more than attorney argument that the goods are related and travel in similar channels of trade to the same classes of consumers. But mere attorney argument is of no help either. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence.") (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76

USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

Furthermore, Opposer's argument that the goods are "presumed to travel in the same channels of trade to the same class of purchasers," 67 TTABVUE 24, is misplaced. The presumption Opposer cites applies when the identified goods are identical, but here, as explained above, there is no evidence that the parties' goods are even related. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). While we may presume that the parties' goods will be "offered in all channels of trade which would be normal therefor," *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006), Opposer has not provided any evidence regarding the "normal" channels of trade for Applicant's identified goods in the United States.

In short, Opposer has not established that the goods are related or that they are offered in overlapping channels of trade to the same consumers. These factors weigh heavily against finding a likelihood of confusion.

D. Consumer "Sophistication"

Applicant argues that "Opposer's consumers are sophisticated," and would therefore "not think that [the parties' goods] come from the same source," pointing out that Opposer refers to its products as "luxury linens." 68 TTABVUE 22-23 (citing 67 TTABVUE 11). The problem for Applicant is that in this case Opposer is relying primarily on its registration rights, and we must therefore base our decision on the

“least sophisticated potential purchasers” for the goods identified in the pleaded registration. Opposer does not identify its goods as “luxury” items in its registration, and its identification of goods does not limit the channels of trade or classes of consumers for those goods. Thus, as identified in Opposer’s pleaded registrations, those goods could encompass basic, inexpensive linens, as well as luxury linens. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162-63 (Fed. Cir. 2014). We therefore find this factor neutral.

VI. Conclusion

Although the marks are similar and Opposer’s pleaded mark enjoys some commercial strength, Opposer has not shown that the goods are related, or that they travel in the same channels of trade to the same classes of consumers, and this failure is dispositive. Here, because the goods are not related, confusion is unlikely notwithstanding that the marks are similar. *See Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive.”); *Local Trademarks Inc. v. The Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (“even though opposer’s services and applicant’s product are or can be marketed to the same class of customers, naming plumbing contractors, these services and goods are so different that confusion is not likely even if they are marketed under the same mark”); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669-70 (TTAB 1986) (opposition dismissed because the goods were “quite different,” notwithstanding that the marks were the same).

Decision: The opposition is dismissed.